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In the Supreme Court of the United States

October Term, 1944.

H. G. HOUSE, *Petitioner,*

vs.

UNITED STATES OF AMERICA, LEONA RICHARD FOX, WANDA RICHARD CURTIS, FLORENCE MARIE BARNETT, NOW TOWNSEND, GEORGE BARNETT, JR., BY HIS LEGAL GUARDIANS, GEORGE BARNETT AND J. L. CORBIN AND RINA RICHARD HOWELL, NOW URQUHART.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

The petitioner, H. G. House, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on August 25, 1944, affirming the judgment of the United States District Court for the Eastern District of Oklahoma.

Opinion Below.

The opinion of the Circuit Court of Appeals appears in the record. (R. 1429) The opinions of the District Court

are embodied in the findings of facts and conclusions of law, likewise in the record. (R. 102, 448 and 510)

Jurisdiction.

The decision of the Circuit Court of Appeals, here sought to be reviewed, was entered August 25, 1944. (R. 1429) A petition for rehearing was timely filed (R. 1441), and it was denied September 21st, 1944. (R. 1448)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended. Title 28, Sec. 347 (a), U. S. C.

Questions Presented.

I.

Whether the Superintendent of the Five Civilized Tribes of Oklahoma has authority to pay to a full-blood Indian restricted money, belonging to said Indian, without specific authority from the Secretary of the Interior.

II.

Whether the restrictions on the money, belonging to a full-blood Indian of the Five Civilized Tribes of Oklahoma, while in the custody and control of the Secretary of the Interior follows the money into the hands of the Indian and, further, into the hands of a recipient from the Indian.

Summary Statement of Matter Involved.

The facts necessary to be here considered are set forth in the opinion of the Circuit Court of Appeals. (R. 1429)

For the convenience of this Court, they may be concisely stated as follows:

Eastman Richard, a full-blood Creek Indian, during his

lifetime, received from the Superintendent of the Five Civilized Tribes of Oklahoma, the major part of the royalties from his restricted lands. For the period beginning in 1915 and ending in 1924, these payments aggregated about $1,300,000.00.

In 1924, he entered into a written contract with H. G. House to act as attorney and business agent for him. This arrangement continued to the time of his death—March 31, 1934. The payments made to Eastman Richard during this latter period aggregated more than $300,000.00.

All these sums released by the Superintendent were disbursed by checks payable to Eastman Richard.

No specific written authority to disburse these funds to Eastman Richard was given by the Secretary of the Interior to the said Superintendent.

This suit was brought by the heirs of Eastman Richard against House in the District Court of the State of Oklahoma in and for Muskogee County. Plaintiffs sought an accounting from House as a so-called "fiduciary."

Notice of the pendency of the suit was served on the Superintendent in accordance with the provisions of the Act of April 12, 1926. (44 Stat. 239.)

Jurisdiction of the United States Court was alleged to exist because of the claim that the funds, sought to be recovered from House were restricted in his hands. (See Petition for Removal, R. 18.)

When removed to the United States Court, the United States intervened and sought the same recovery on behalf of the plaintiffs.

House was required to and did file an accounting. (See R. 105 to 448.)

His accounts were approved by the trial court and the Circuit Court of Appeals on appeal in all respects other than his claim to compensation. As to the items, claimed for compensation, he was surcharged and judgment rendered against him accordingly.

Reasons for the Allowance of the Writ.

First. The decision of the Circuit Court of Appeals for the Tenth Circuit is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *American National Bank* v. *American Baptist Home Missionary Society,* 106 F. (2d) 192.

Second. The opinions of the solicitors for the Department of the Interior and the construction, placed thereon by the administrative officers of the Department are in hopeless conflict with the opinion of the Circuit Court of Appeals for the Tenth Circuit.

Third. The decision has the effect of rendering illegal the disbursements of vast sums of money by the Superintendent of the Five Civilized Tribes of Oklahoma covering a period of more than twenty years thereby encouraging a flood of litigation, seeking the recovery of such funds by the heirs of deceased Indians.

Fourth. This decision holds that restrictions follow money into the hands of the Indian owner and the recipients from such Indian which is novel and complete departure from the established practice of dealings with Indian funds for more than twenty years.

BRIEF.

FIRST.

The decision in this case is contrary to that in *American National Bank* v. *American Baptist Home Mission Society*, 106 F. (2d) 192.

In that case, the payments of restricted money were made to the Indians by the Superintendent without authority from the Secretary of the Interior and his actions were upheld as being within his powers. And in that opinion, the court discussed and interpreted the regulations of the Department.

The same regulations, with minor changes in wording (R. 485), were in force in the instant case.

The Act of February 14, 1920, (41 Stat. 400-426) was not considered in the cited case.

The regulations were not considered in the instant case.

Under both the act and the regulations, the Superintendent had the authority to make the disbursements without the consent of the Secretary of the Interior.

In the opinion here in question, the attempted distinction between the facts in this case and the *American National Bank* case, *supra,* does not result in the application of different legal principles. In this case, the Circuit Court of Appeals merely passes upon the *extent* of the authority of the Superintendent—not *whether he actually had the authority.* The conclusion is reached that, if the Superintendent had authorized *part* of the funds to be disbursed, his action would be proper in accordance with the holding of the *American National Bank* case. The question is one

of the *existence* of the authority—not the *extent* of the exercise thereof.

And the attempted distinction between the two cases has no basis in the applicable statutes, regulations or interpretation of the governmental agencies.

SECOND.

The conflict of opinions as to the authority of the Superintendent to pay out restricted moneys to Indians without express authority or direction from the Secretary of the Interior.

The Acts of May 25, 1918 (40 Stat. 561-579), June 30, 1919 (41 Stat. 3-21), and February 14, 1920 (Appendix "A") (41 Stat. 408-426), are practically identical. These statutes *prohibit* the forwarding of undisputed claims against Indians to the Secretary for approval.

The opinion of Charles D. Mahaffie, solicitor for the Department of the Interior (R. 452), in 1919 expressly held that such prohibition applied to payments to be made to individual Indians.

The opinion of Edmund Booth, solicitor for the Department of the Interior (R. 454), which was dealing primarily with other matters, by *dictum*, held otherwise.

Since 1919 the Superintendent followed the practice of paying out money without such express direction of the Secretary (see testimony of A. M. Landman, Superintendent since 1931 (R. 488, *et seq.)*, J. T. Wilkinson, assistant Superintendent (R. 498, *et seq.)*, and D. Buddrus, chief disbursing officer since 1918 (R. 505)). This practice continued to the time of trial. (R. 502)

The case of *American National Bank* v. *American Bap-*

tist Home Missionary Society, supra, held that the consent of the Secretary of the Interior was not necessary.

The decision of the Circuit Court of Appeals here in question holds that such consent is necessary.

Millions of dollars of payments, made in the past, are involved. As to the future, only prophecy is available.

An unseemly uncertainty of important functions of the Government exists.

The familiar rule as to the contemporaneous construction of the Act of 1920 by the Government officials charged with the administration of the Indians' funds is ignored in the opinion of the Circuit Court of Appeals. It should have some consideration where such conflict of legislation, judicial opinion and administrative actions are concerned.

—*Foot* v. *Town of Watonga,* 37 Okl. 43, 130 Pac. 597;
State of Wisconsin v. *State of Illinois,* 49 S. Ct. 163, 278 U. S. 367, 73 L. ed. 426.

THIRD.

The observations as to the second reason above apply with equal force to the third reason urged for granting the writ.

FOURTH.

The original attitude of the Government towards the Indians did not contemplate control or restriction over the disposition of money, as such, after it left the hands of the official of the United States charged with its custody and care.

—Handbook of Federal Indian Law, by Felix S. Cohen, p. 195.

The rule with reference to lands was different; there,

restrictions attached to the land until removal or the expiration of the restriction period.

It has never been theorized that restrictions follow money, as such, into the hands of the Indian who received it as his own property nor in the hands of anyone who received money from the Indian, himself.

The fallacy of reasoning otherwise is well illustrated by this case. A brief analysis of the accounts which are here in question (R. 105 to 448, inc.) shows that more than 25% of the money involved was derived from sources clearly unrestricted. Whether Eastman Richard paid Mr. House out of funds claimed to be restricted or out of funds which clearly were not restricted is not and cannot be proved.

It is respectfully submitted that a writ of *certiorari* be granted.

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